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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-25

HAMMONS PRODUCTS COMPANY, *Petitioner*

v.

AGRASHELL, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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Petitioner Hammons replies as follows to Respondent Agrashell's brief in opposition to certiorari:

1. We submit that a careful, fair reading of the entire opinion of the Court of Appeals, even without more, will confirm the essential correctness and validity of the statement of the case on pp. 2-6 of the petition for certiorari. In its opposition brief (pp. 1, 5), Agrashell attempts to discourage granting certiorari

by misreading the Petition so as to cast doubt on the identity of the product here involved and the geographic market in which it was sold. For all purposes material to this case, the Court of Appeals identified the product as "crushed black walnut and apricot pit nutshell used as SGA" (Pet. App. B, p. 33a).[1] Our description on p. 3 of the Petition fully accords with that of the court. As to the geographic market, the Court of Appeals stated, "Since no attempt was made to narrow the geographic area, we assume the relevant area is the entire United States" (Pet. App. B, p. 33a). Both parties' evidence at the trial described a market that was national in scope (II App. 199T, III App. 781T-783T). Indeed, the damages for lost profits which the District Court awarded Hammons for violation of section 1 of the Sherman Act, and which were fully sustained by the Court of Appeals, were predicated on a nationwide market (Pet. App. B, p. 23a). Our Petition (p. 3) expressly states that the market is "nationwide."

2. On p. 5 of its brief, Agrashell charges that by characterizing it and Hammons as the principal competitors we meant to imply that there was sufficient proof of the total product market and the respective shares of all the participants in that market.[2] The clearest refutation of this unfortunate charge is to be

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[1] Without objection, essentially the same description was contained in the instructions to the jury (III App. 988T).

[2] The statement that Hammons and Agrashell were the principal competitors was in the nature of a general description based on the undisputed evidence at the trial, without reference to their mathematical shares (II App. 40-41T, 56T, 292T, III App. 609T, 636-38T, 697T, 789-90T, 797-800T, IV App. 52-55, PX252, V App. 27-29, DX42, 43(b), 102-04, DX 619.)

found at the very beginning of our Petition with the posing of the single question of whether proof of market shares is *always* required and then following with a showing that in our type of case, such proof is *not essential*. We posed no question or argument whatever before this Court as to the sufficiency of the evidence on the total market and participating shares.

3. Even if true, we frankly cannot understand Agrashell's recitations on pp. 2, 5-6 of its brief with respect to "misuse of patent," "fraudulent procurement of patent," and "intent," unless it is to confuse the clear issue here. None of these things served as the basis for the appellate reversal. The one and only basis for nullifying the litigation cost award was the conclusion by the Court of Appeals that there was insufficient proof of total market and participating shares and that therefore it could not be determined whether Agrashell approached so close to monopolization as to create a dangerous probability of it (Pet. App. B, pp. 32a-35a).

Nevertheless, we do not feel sufficiently charitable to abstain from briefly showing that the recitations are incorrect and misleading. While the court below expressed doubt about the strength of some of the evidence on the issue of intent to monopolize, it *expressly* stated that it was not resting its decision on this issue (Pet. App. B, p. 30a). As to the matters of fraudulent procurement and misuse of patent, Agrashell confusingly glosses over the fact that there were two separate decisions, the first solely concerned with the validity and infringement of the patent, and the second concerned with the antitrust issues (Pet. App. B, pp. 5a-6a). Although Hammons was successful in having the patent declared invalid, the district court in exercise

of its wide discretion under the Patent Code (35 U.S.C. 285) refused to award Hammons the attorneys' fees incurred in this particular and limited phase of the proceedings. The refusal had nothing to do with the sections 1 and 2 antitrust issues yet to be tried, where Hammons charged that as a result of Agrashell's illegal predatory actions and misuse of patent it had lost profits and incurred litigation costs in defending itself and others whom it had an obligation to defend. While evidence of fraudulent procurement of the patent was introduced in both trials, the judge refused to submit the issue of fraudulent procurement to the jury in the antitrust case. We surmise that what Agrashell is saying is that since no attorneys' fees were awarded in the patent case and the issue of fraudulent procurement was not allowed to go to the jury in the antitrust case, the alleged illegal predatory actions and misuse of patent were somehow immunized. That this is not the law or the theory of the case is obvious from the very fact that the district court's award under section 1 for lost profits was here affirmed by the Court of Appeals on the basis that the period of two exclusive agency contracts extended beyond the expiration of the patent and the jury could find this misuse of the patent as an illegal restraint of trade (Pet. App. B, pp. 19a-22a). Moreover, as to the recovery of the litigation costs here in issue, the district court gave the following jury instructions:

> . . . I am instructing you as a matter of law . . . that Agrashell had the right to rely on the legal presumption that the patent was valid until it was declared invalid as to certain claims in it by a court of law. Therefore, the exercise of rights under the Perry Reissue Patent by Agrashell were not in themselves unlawful. The law gave Agra-

> shell the right to enforce its patent rights against all others. In other words, Agrashell had a legal monopoly granted by the patent laws of the United States as to the manufacture and sale of the products covered by the patent.
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> • • • • • • • • • •
>
> Ordinarily the bringing of an infringement suit to enforce a patent and collect damages for alleged infringement of the patent is a perfectly legal right, and if brought in good faith to protect the patent rights which Agrashell was entitled to believe it held, there would be no violation of the antitrust laws.
>
> Hammons contends and has the burden of convincing you by the preponderance of the evidence that these suits were not brought in good faith but were brought with the intent to monopolize by either extending the patent beyond its legal life or extending it to nutshell products not covered by the patent. (III App. 981T-982T, 985T-986T)

4. Heedful of the rule governing reply briefs, we will not extend the debate with respect to the holdings of the principal cases cited by both parties. We believe that our interpretations of these cases as set forth in the Petition are correct. We would only add that *Moore* v. *Matthews & Co.,* which is cited on p. 8 of Agrashell's brief, supports, rather than rejects or weakens *Lessig,* as witness this full paragraph of the court's opinion:

> Finally, this court has ruled that an attempt to monopolize under section 2 does not require proof of monopoly power. Proof that there is 'dangerous probability of success' is certainly enough. Lessig v. Tidewater Oil Co. (9th Cir. 1964) 327 F. 2d 459. *Evidence of market power is relevant,*

but not indispensable to a Lessig claim. [473 F. 2d 332, emphasis added].

A June 15, 1973 district court opinion in the Ninth Circuit (*Dobbins* v. *Kawasaki Motors Corp.*, 1973 Trade Cases 74609) so interprets *Moore* v. *Matthews*, and in reference to the specific case before it, states that, "Evidence of market power is still relevant, but not indispensable, where a substantial claim of restraint of trade is made." Apropos of this quotation, we would re-emphasize that not only was there a substantial claim of restraint of trade under section 1 in our case, but this claim resulted in a substantial damage award in the district court and was affirmed on appeal (Pet. pp. 4-6; App. B, 19a-22a).

Respectfully submitted,

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